

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3497

Appeal MA16-55

The Corporation of the Town of Amherstburg

September 21, 2017

Summary: The appellant made a request to the town for a copy of a legal memorandum from a named lawyer in relation to a Council motion regarding approval of training expenses. The town granted partial access to the record, citing sections 7(1) (advice or recommendations) and 12(1) (solicitor-client privilege) to withhold the remainder. In this order, the adjudicator upholds the town's decision with regard to section 12(1) and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12(1).

Orders and Investigation Reports Considered: Orders 1172, 2945-I.

Cases Considered: *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

BACKGROUND:

[1] The appellant made a request to the Town of Amherstburg (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a full copy of the legal report from a named lawyer from August/September in relation to a Council motion regarding approval of training expenses, and containing a specified paragraph.

[2] The town notified an affected party, the lawyer who wrote the legal memorandum, about this request and subsequently issued a decision granting partial

access to the record withholding parts pursuant to sections 7(1)(a) and (d) (advice or recommendations) and 12(1) (solicitor-client privilege) of the *Act*. The town released all parts of the record to the appellant except the conclusions which contain the legal advice.

[3] The requester (now the appellant) appealed the town's decision.

[4] During mediation, discussions were held with both the town and the appellant. The town maintained its position.

[5] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry under the *Act*. The parties were invited to submit representations which were shared in accordance with section 7 of IPC's *Code of Procedure and Practice Direction 7*.

[6] In this order, the adjudicator upholds the town's decision to withhold portions of the record under section 12(1) and dismisses the appeal.

RECORDS:

[7] Portions of a three-page legal memorandum.

ISSUES:

- A. Does the discretionary exemption at section 12(1) apply to the records?
- B. Did the institution exercise its discretion under section 12(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A: Does the discretionary exemption at section 12 apply to the records?

[8] Section 12 states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[9] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[10] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[11] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.¹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.² The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.³

[12] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁴

[13] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁵ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁶

Litigation privilege

[14] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.⁷ Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.⁸ It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.⁹ The litigation must be ongoing or

¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

² Orders PO-2441, MO-2166 and MO-1925.

³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁷ *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

⁸ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

⁹ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

reasonably contemplated.¹⁰

Loss of privilege

Waiver

[15] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.¹¹

[16] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.¹²

[17] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹³ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁴

Termination of litigation

[18] Common law litigation privilege generally comes to an end with the termination of litigation.¹⁵

Representations:

[19] In its representations, the town states that the withheld portion of the record (the memorandum) is subject to solicitor-client privilege as it was prepared by counsel retained by the town for the purpose of giving legal advice. It states that it did not waive the privilege and that if the memorandum was released it would have a chilling effect on the ability of the town to carry out its function because it could not know in advance that privileged material would not be subject to disclosure to any person.

[20] In his representations, the appellant states that the memorandum was obviously prepared for public dissemination and refers to the way the town dealt with it. The appellant relies on Order MO-2222 where it was held that in order for privilege to apply,

¹⁰ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

¹¹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹² *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹³ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹⁴ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

¹⁵ *Blank v. Canada (Minister of Justice)*, cited above.

the town "must demonstrate that the communication was made in confidence, either expressly or by implication." The appellant states that it is clear that none of the people involved viewed or treated the information in the memorandum as confidential for the following reasons:

1. All members of council were referring to it in an open council meeting;
2. The CAO quoted the memorandum in his report to council;
3. The CAO referred to the memorandum and its contents openly during the council meeting; and,
4. The CAO referred to the memorandum and quoted its contents to a local newspaper.

[21] Further, the appellant argues that litigation privilege attaches to issues of litigation or potential litigation. The appellant states that the question addressed by the memorandum was not a litigation issue, rather, it was a procedural issue. The appellant states that the issue was whether or not a resolution passed by council was over-ridden by a subsequent resolution passed during budget deliberations. The appellant submits that common law privilege does not apply because there is no litigation, and no potential for litigation in regards to that issue.

[22] The appellant refers to Order MO-2222 and states that in order for branch 1 to apply, four factors must be met:

1. There must be written or oral communication;
2. The communication must be of a confidential nature (the potential for litigation);
3. The communication must be between a client (or his agent) and a legal advisor; and,
4. The communication must be directly related to seeking, formulating or giving legal advice.

[23] The appellant states that factor 2 has not been met as there was no potential for litigation as it was merely a procedural question and therefore the common law privilege does not apply.

[24] With regard to the waiver of privilege, the appellant states that waiver is established when it is shown that the holder of the privilege knows of the existence of the privilege, and voluntarily evinces an intention to waive the privilege.

[25] The appellant submits that the town did not release just one sentence from the memorandum, as an entire paragraph was included on the public agenda. Furthermore,

the appellant submits that the memorandum was repeatedly referred to during the council meeting. Also, it is submitted that the CAO quoted the memorandum and spoke openly about it to a local newspaper. The appellant submits that council and the CAO were not simply referring to the bottom-line of a legal opinion, but they repeatedly referred to a full paragraph of the memorandum which included more than just the bottom-line advice.

[26] The town provided reply representations in this appeal, it noted that the memorandum was sent to the CAO and marked "confidential." It acknowledges that the CAO made a report to the mayor and town council (the CAO report) regarding council approval for training expenditures.

[27] The town again submits that the memorandum was prepared by a solicitor retained by it for use in giving legal advice on the issue of council approval for training expenditures and the functions of the CAO in relation to authorizing such expenditures. It sets out the portion of the memorandum that was included in the CAO report noting that in the CAO report it is stated that the independent legal opinion is consistent with the position taken by the CAO.

[28] The town submits that the existence or potential for litigation is not a requirement for the privilege to apply.

[29] The town notes that the conclusion from the memorandum quoted in the CAO report is in fact a single sentence and a portion of that sentence was quoted in a local newspaper. The town submits that there was no intention to waive the privilege in relation to the memorandum and that the publication of the conclusion was necessary to answer the council question which led it to seeking the independent legal advice. It states that only a single sentence was disclosed in order to deal with the publicly asked question from council, and no further disclosure was necessary in order to provide that answer.

[30] The town therefore submits that the solicitor-client privilege for the entire memorandum was not waived and states that the appellant has provided no authority for its position that it was waived.

[31] The town refers to the Supreme Court of Canada decision *Alberta (Information and Privacy Commissioner) v. University of Calgary*¹⁶, which it states illustrates that there is a compelling public interest that the memorandum not be disclosed and that the town's solicitor/client privilege not be infringed. It states that without the assurance that solicitor and client communications can and will be protected, the town cannot obtain the expert advice necessary to properly administer its municipal functions.

[32] Further, the town states that the appellant's assertion that there is a public

¹⁶ 2016 SCC 53.

interest, "in wanting to know what the memorandum regarding all of these public proceedings entail", is nothing more than a bald assertion that the appellant's curiosity is greater than the town's "important civil and legal right" and "a principle of fundamental justice in Canadian law."

[33] The appellant provided sur-reply representations in this appeal and states that the way the town dealt with the memorandum demonstrates that it specifically wanted it to be known to the public and wanted to disclose the contents of the memorandum to the public so that it could justify its actions to the public. The appellant states that if this was not the town's intention then the memorandum would have remained in-camera and none of it would have been disseminated to the public. However, once the town made the decision to disseminate information in the memorandum to the public, the appellant argues, it waived any privilege to the document, if such privilege ever existed.

Analysis and findings:

Does the solicitor-client privilege exemption apply to the record at issue?

[34] The town submits that the withheld portion of the record is subject to solicitor-client privilege as it was created in the context of a solicitor-client relationship for the purpose of conveying confidential legal advice. The appellant disputes that the record is subject to solicitor-client privilege and contends that if it is, any privilege has been waived by the town.

[35] I have considered the representations of the parties and reviewed the record at issue in this appeal. I find that the record at issue is a legal opinion prepared by a law firm retained by the town for the purpose of communicating confidential legal advice in relation to the issue of council approval of training expenditures. I do not accept the appellant's assertion that the memorandum was obviously meant to be distributed publicly. In fact, I am satisfied that this document was prepared and intended to be communicated in confidence. The memorandum was marked as confidential. The CAO report divulged the bottom-line advice of the legal opinion to council and not the entire memorandum. This is reinforced by the manner in which the document was referred to in the CAO report dated August 26, 2015. Accordingly, I have no difficulty finding that the memorandum qualifies for exemption under the first head of privilege encompassed by branch 1 (solicitor-client communication privilege) at section 12. Given that I have found that the first head of privilege under branch 1 applies, it is not necessary for me to consider whether the second head of branch 1 (litigation privilege) also applies.

[36] I reject the appellant's assertion that pending litigation is a necessary factor to prove solicitor-client privilege. As mentioned previously in this order, solicitor-client privilege protects direct communications of a confidential nature between a solicitor and

client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.¹⁷ There is no requirement of pending or potential litigation. In addition, I reject the appellant's suggestion that solicitor-client privilege cannot attach to communication regarding a procedural question. The appellant provided no authority for this proposition and I find that there is no basis for such a finding. I also note that where the appellant, in his representations, is referencing MO-2222 to support his claim that there must be a potential for litigation, he was in fact referencing the township's own representations in that order and not a finding of the adjudicator.

[37] As a result, I am satisfied that the record at issue is solicitor-client privileged, as it constitutes a legal opinion provided by a lawyer to the client for the purpose of providing legal advice.

[38] I will now review the various arguments regarding whether the solicitor-client privilege that existed was waived.

Was solicitor-client privilege waived?

[39] The appellant suggests that any solicitor-client privilege attaching to the record at issue was waived. He suggests that the town released an entire paragraph from the memorandum not just a sentence, he also stated that the memorandum was referred to repeatedly in a council meeting and that the CAO quoted extensively from the memorandum to the local media.

[40] In fact, when looking at the record, it is clear that the town publicly released part of one paragraph, which consists of one sentence, through a CAO report to an open meeting of council. The sentence divulged the bottom-line advice. In addition, in reviewing the local news article concerning this issue, referred to by the appellant, I note that it quotes the same sentence that was released from the memorandum in the CAO report. The rest of the news story speaks about the issue with council in approving training expenses, speaks to the cost of obtaining the legal opinion and briefly discusses the training matter that crystalized the dispute. I find that nothing except the bottom-line legal advice has been divulged by the town from the memorandum.

[41] In addition, I find that the CAO did not intend to waive privilege in the legal memorandum by his actions in releasing this "bottom-line" information. The actions of the CAO, releasing only one sentence from the legal memorandum and not the entire document, evidence an intention to maintain privilege in the legal memorandum. The disclosure to the local media only included information from that one excerpt in the CAO report. In the circumstances of the present appeal, I am satisfied that in making his report, the CAO did not intend to waive privilege with respect to the record and provided "a minimal degree of disclosure" to carry out its mandate and responsibilities. Accordingly, I do not find that there has been any express waiver of privilege.

¹⁷ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[42] With respect to whether there has been a waiver of privilege other than by express intention, *S & K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, is a decision setting out the common law test for waiver of privilege. In Order MO-2945-I, Assistant Commissioner Sherry Liang, summarized the court's position as follows:

the court recognized that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require."¹⁸ The court referred to the proposition that "double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived."¹⁹

Thus where there is no evidence of an express intention to waive, the question is whether "fairness and consistency" requires a finding of implied, or implicit, waiver.

[43] The Assistant Commissioner in MO-2945-I dealt with a town's submission that releasing an executive summary of a legal opinion was done in the interests of public transparency and did not amount to an implied waiver of privilege. The Assistant Commissioner referred to a number of orders of this office that upheld privilege where public disclosure of some information gave rise to claims of implied waiver. As in this instance, those cases involved actions and conduct of public bodies disclosing a "small portion of the bottom line" or a portion of a conclusion reached in a privileged legal opinion and such "relatively minimal disclosure" was found not to amount to implied waiver requiring disclosure of the privileged material.

[44] For example, in Order MO-1172, Adjudicator Laurel Cropley rejected the argument that a public report's reference to a "small portion of the 'bottom line'" advice contained in that memorandum constituted waiver of privilege in the memorandum. In fact, the adjudicator noted that public disclosure of such information may often be necessary in the interests of transparency, she stated:

it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication (Order P-1559).

¹⁸ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹⁹ Set out in Wigmore on Evidence, cited in *S & K Processors* at para. 10.

...

This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.

[45] After considering the cases referred to above, I find that the town did not implicitly waive privilege to the legal memorandum. It released bottom-line information from the memorandum to council in order to address the issue that resulted in the commission of the memorandum. I am cognizant of the environment in which the town operates and its responsibilities with respect to the public interest and find that by releasing the bottom-line information, the town was maintaining transparency with its council.

[46] Further, I do not agree with the appellant's submission that by revealing the same passage to the media, as was revealed to council, amounts to waiver by the town. The adjudicator in Order MO-1172 stated that "it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities." The adjudicator noted that in many instances, a public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. I find that the town did not disclose more than the one sentence it had disclosed to council and by doing so it was maintaining transparency with the public.

[47] In fact, I find the town's approach, in dealing with severing the record in response to the access request, was reasonable as it released all parts of the record except the conclusions which contain the legal advice. It released parts of the memorandum that set out the issue the solicitor was asked to provide an opinion on, it set out the facts that led to the question being sent out for legal advice, the material the solicitor relied upon to make their legal opinion and the legal principles used for guidance. The town also released a part of the conclusions that does not qualify as legal opinion. Other than the one sentence referenced above, the town did not disclose the conclusions in the memorandum. This is suggestive of its ongoing intention not to waive the solicitor-client privilege attached to the legal memorandum.

[48] As there has been no express or implied waiver of privilege, I find that the withheld portions of the record are exempt under branch 1 of section 12 of the *Act*, subject to my review of the town's exercise of discretion. In the circumstances, it is not necessary for me to consider whether the statutory privilege of the section 12 exemption would apply to the record.

B: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[49] The section 12(1) exemption is discretionary and permits the town to disclose information, despite the fact that it could withhold it. The town must exercise its discretion and, on appeal, this office may determine whether the town erred in doing so.²⁰

[50] This office may find that an institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In any of these situations, this office may send the matter back to the town for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the town.²²

[51] It is the town's position that it properly exercised its discretion under section 12. The town notes that the appellant is not seeking his own personal information. The town submits that if the withheld portion of the record was released, it would have a chilling effect on the ability of the town to carry out its functions because it could not know in advance that privileged material would not be subject to disclosure to any person. In addition, the town adds that publication of the single sentence in the CAO report was necessary to confirm that a legal opinion confirmed the position of the CAO in relation to training expenses. The town submits that the disclosure of the bottom-line advice was disclosed in order to deal with a publicly asked question from council.

[52] The appellant's representations did not specifically address the issue of whether the town properly exercised its discretion under section 12(1). In the appellant's comments the public interest override was alluded to, however, since the *Act* does not contain an explicit public interest override for records exempt pursuant to solicitor-client privilege under section 12, the public interest in disclosure is instead a consideration in the exercise of discretion in applying the exemption.²³

[53] I have considered the town's submission on the factors it took into consideration in exercising its discretion to not disclose the portion of the record, for which it claimed exemption under section 12. In reviewing the appeal file, I note that the town contacted the third party, the solicitor, for his view regarding disclosure. The town confirms that it considered the fact that certain information had been released to the public and that solicitor-client privilege applies to the records. I have considered the circumstances of this appeal and find that the evidence before me is sufficient to support a finding that the town exercised its discretion in good faith and that it

²⁰ Orders PO-2129-F and MO-1629.

²¹ Order MO-1573.

²² Section 43(2).

²³ See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

considered relevant factors in doing so. Based on the manner in which the town applied the exemption, I am satisfied that it took into account relevant factors and did not take into account irrelevant factors. On the whole, I see no basis for interfering with the town's exercise of discretion.

[54] I find that the town properly exercised its discretion to withhold information under section 12(1) and I uphold its exercise of discretion.

ORDER:

I uphold the decision of the town that the record qualifies for exemption under section 12 of the *Act*, and dismiss the appeal.

Original Signed by: _____

Alec Fadel
Adjudicator

September 21, 2017 _____